Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
IP-Enabled Services	)	**WC Docket No. 04-36**

COMMENTS OF WILTEL COMMUNICATIONS, LLC

Blaine Gilles, Ph.D
9525 W. Bryn Mawr, Suite 140
Rosemont, IL 60018

Adam Kupetsky
WilTel Communications, LLC
One Technology Center TC 15-H
Tulsa, OK 74103

Peter A. Rohrbach
David L. Sieradzki
Hogan & Hartson LLP
555 13th Street, NW
Washington, DC 20004

May 28, 2004

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WilTel Communications, LLC ("WilTel") hereby submits its comments in response to the *Notice of Proposed Rulemaking* in the proceeding referenced above ("*NPRM*").

INTRODUCTION

In this *NPRM* the Federal Communications Commission ("FCC" or "Commission") asks a wide range of important questions regarding how to define and regulate "IP-enabled" services. While many of these matters must be addressed, WilTel focuses its initial comments on the *NPRM*'s most time-sensitive and industry-impacting issues: intercarrier compensation and universal service. We in no way minimize the importance of other topics raised by the Commission, particularly public safety, national security, and disability access issues.

However, WilTel focuses on access and universal service charges because those are the most immediate and competitively sensitive issues presented by the *NPRM*, especially with respect to Voice over IP ("VoIP"). Action on these matters is necessary now -- even on an interim basis. The Commission itself has recognized that it may address access and universal service issues before and separately from all of the other complex IP-related questions raised in this docket. *See NPRM* at ¶32, n. 112 and ¶61, n. 180. WilTel submits that the Commission

must clearly articulate the current rules in this area now, so that the industry does not have to guess at the law, or compete on their relative taste for taking on regulatory risk and litigation. 1/

WilTel is a nationwide facilities-based carrier that provides wholesale long distance telecommunications service and wholesale and retail data and IP services. Like virtually all industry participants, WilTel is implementing technology in its network that allows voice traffic to run over IP equipment. This technology allows voice traffic to be routed more efficiently throughout the network, and permits companies to develop new services and features based on the technology. These are important factors that everyone recognizes will drive investment in IP technology as the technology continues to improve. 2/

Notwithstanding the potential benefits of IP, however, WilTel submits that the real urgency for this proceeding is directly related to access and universal service dollars more than anything else. Significantly, VoIP is not being sold as an improvement in local exchange service. Rather, VoIP is recognized by industry and analysts as a potentially regulation-favored substitute form of *interexchange service*. Indeed, many industry observers and participants believe that

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1/ Some of these issues also are presented in other dockets that the Commission has referenced here, *see NPRM* at ¶32, such as the pending Level 3 Petition for Forbearance Under Section 47 U.S.C. §160(a) from Enforcement of 47 U.S.C. §251(g), Rule 51.701(b)(1) and Rule 69.5(b), WC Docket No. 03-266 (filed Dec. 23, 2003)("Level 3 Petition").

2/ To be clear, IP technology is deployed in conjunction with other more mature transport technologies. So long as one form of network equipment is not artificially favored by regulation (such as in access or universal service rules), companies will make deployment decisions based on the relative cost, reliability, security and functionality of that equipment. WilTel assumes most parties would agree that FCC regulation should be technology-neutral, but this docket directly presents such issues.

VoIP is an industry-shifting technology primarily because they expect that it will not be subject to access or universal service obligations. 3/

While WilTel agrees that the Commission should facilitate the development of new technology with as little regulation as possible, the FCC must keep its eye on the enormous competitive significance of access and USF charges today. As the Commission is well aware, these fees are the primary cost element of interexchange service; if they can be avoided, customer rates can be substantially reduced. Putting aside for the moment the defects of the current access and USF systems, WilTel's main concern is equity and non-discrimination among competitors. Today competitors operate in a field of uncertainty, self-help, and disputes. The Commission needs to act quickly so that everyone understands and is subject to the same rules, whatever they may be:

1. The Commission must clearly define when access and universal service apply to voice services using IP in some capacity, and when they do not.

2. The Commission must apply the same principles when the "IP-enhanced" voice service is provided end to end by one entity, and when several interconnecting companies carry the traffic.

3. The Commission must provide these answers now. Even interim answers pending further consideration are far better than delay. And the Commission must be prepared to enforce its rules against those who ignore them.

WilTel discusses each of these matters briefly below. We look forward to reviewing the comments of other parties, and participating further in this important proceeding.

3/ The VoIP disputes today bear some resemblance to those of the old "dial around" days of the late 1970s and early 1980s, before equal access and the access charge rules implemented with divestiture. At that time long distance customers would trade off certain conveniences for lower prices made possible by cheaper interconnection. *Se, e.g., Access Charge Reform,* 15 FCC Rcd 12962, at ¶8 (2000). However, unlike "dial around" days, IP-enabled" voice services are not less convenient than their TDM-based equivalents. The question is why they should be subject to disparate regulatory treatment.

DISCUSSION

A. The Commission Must Clearly Define When Access And Universal Service Apply To Voice Services Using IP In Some Capacity, And When They Do Not.

WilTel strongly supports comprehensive access charge and USF reform. However, we also are realistic that reform will not happen overnight, or necessarily even soon. Meanwhile, market distortion is occurring today, as parties look for opportunities for competitive advantage by avoiding access charges and USF contributions through arbitrage of alleged (or accepted) distinctions between, for example, "information services" and "telecommunications services." The Commission has taken a useful step in the *NPRM* when it states "that the cost of the PSTN should be borne equitably among those that use it in similar ways." *NPRM* at ¶61. We agree with this principle, and with the overall goal of better meeting the non-discrimination requirements of the Telecom Act.

Meanwhile, however, ambiguity in and failure to enforce the Commission's access and universal service rules increasingly harm the public interest. Some competitors simply do not pay their fair share of access or USF even under the current rules. 4/ The significant competitive advantage they thus achieve distorts interexchange competition, and penalizes companies who take compliance more seriously. One must keep in mind that the voice service market is highly competitive, and margins are extremely thin. That market is distorted when some carriers avoid

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4/ WilTel is aware that some companies are asserting that the Commission did not speak clearly in its recent order on PSTN-to-PSTN IP-enabled services. *See Order, Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt From Access Charges*, WC Docket No. 02-361, FCC 04-97 (rel. Apr. 21, 2004) ("*AT&T IP Order*"). Such firms appear to be taking the position that they still do not need to pay access until and unless the Commission speaks again. Without addressing the merits of particular "interpretations" of the law, we emphasize the need for Commission enforcement as another vehicle to provide clarity and ensure that all companies operate under the same rules, and pay their share of access and universal service.

the access or USF "tax," especially because those who benefit from "tax relief" are not necessarily those with the lowest internal cost structures or best product solutions. The longer this avoidance of access and USF continues, the more other firms are forced to adopt the same strategies, lawful or not, in order to compete. Meanwhile, intercarrier disputes grow, including highly contentious disputes over "retroactivity" based on arguments over the clarity of the Commission's own interpretations of the law.

The significance of these financial issues also has important and potentially harmful impacts in the areas of national security, public safety, and disability access. Homeland Security officials, for example, would wonder at a public policy that penalizes companies operating networks capable of 911-complaint services by forcing them to pay access and USF, when other companies are allowed to avoid such fees by moving to a less 911-friendly network configuration. For that matter, the Commission could unduly jeopardize network reliability itself if it were to adopt rules artificially favoring IP transport facilities over other network equipment and protocols that are more mature and secure. None of this is to suggest that the Commission should not accommodate the development of IP-enabled services. But the Commission should allow such services to develop at their own speed as technology and market forces indicate, without the benefit (and accompanying distortion) of access or USF favoritism.

For purposes of these Comments, however, WilTel's primary concern is that *the Commission must define exactly when an "IP-enabled" service like VoIP is not subject to access and universal service.* If the customer uses different equipment, or an access line above a certain speed, or both, does that mean that originating and/or terminating access rates and/or universal service do not apply? Does it matter if the service provider bundles, along with voice connectivity, some additional feature such as voice mail, time of day, call forwarding, or an

advertisement? For present purposes WilTel is less concerned with how the Commission answers these questions than that it does so clearly and quickly one way or the other -- and then enforces that decision against those who try to game the system. The Commission also can reserve the right to change its policies later in the *Intercarrier Compensation Rulemaking* or elsewhere. 5/ Meanwhile, from a common legal understanding, all parties can structure their services without having to guess as to their financial exposure, or risk future litigation over potential retroactive liability.

Access and USF are currently such significant competitive cost elements that it will be logical for service providers to avoid them if they can -- indeed, assuming some do so, others will have to as well. Thus, providers will migrate to an "access and/or USF-free" category of IP-enabled technology or network configuration whether or not such technology or configuration is more efficient or adds independent value to consumers. Indeed, this migration is happening today in a zone of confusion and dispute absent Commission clarity on the subject. Because the rate and timing of this migration is not something that regulatory uncertainty should decide, the Commission must speak to this issue quickly and clearly, however broad or narrow it decides that the "free" zone should be pending further reform.

B. The Same Principles Apply Whether An "IP-Enabled" Voice Service Is Provided End To End By One Entity, Or Instead Several Interconnecting Companies Carry The Traffic.

The Commission recently has made clear that access charges are due for "IP-Enabled" PSTN-to-PSTN interexchange calls "whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport." *AT&T IP Order* at ¶

5/ Similarly, if the Commission decides that an intercarrier compensation charge other than access should apply to VoIP, *see NPRM* at ¶ 61, it should state clearly the circumstances when that charge would apply.

19 and n.81. In doing so, the Commission expressly reassured AT&T that it would not be placed at a competitive disadvantage by paying access charges for its PSTN to PSTN traffic. AT&T had complained that it would be unfair if the Commission allowed other parties to escape access because, for example, such parties claimed to be providing an "information" service when they terminated IP-enabled calls to the PSTN. 6/ The Commission stated that AT&T would not be harmed because access charges would be due in that context. According to the Commission: "We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers may be paying access charges for these services while others are not." *AT&T IP Order* at ¶ 19.

WilTel appreciates the Commission's action to clarify this point. It is important to reaffirm that the same rules apply whether a service provider self-provisions all transport components end to end, or obtains some of those network components from another company. This conclusion is required by Sections 201 and 202 of the Act. It also is consistent with the development of efficient networks, so that carriers do not have artificial incentives in "build vs. lease" decisions based on more favorable access treatment for one configuration over another.

It should go without saying that the reverse is also true. To the extent that the Commission defines a particular category of IP-Enabled voice service as "access and/or USF free," that treatment should apply equally "whether only one [service provider] uses IP transport or instead multiple service providers are involved in providing IP transport." *Id.* Thus, for example, if the Commission were to grant the pending Level 3 Petition in the context of this docket (or otherwise), and forbear from application of access to broadband originated traffic,

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6/ *See, e.g.,* AT&T Ex Parte Letter, WC Docket No. 02-361 (March 31, 2004)(challenging contentions of some parties that they were providing an enhanced service when they terminated a PSTN-to-PSTN call that had used IP transport, and hence did not have to pay access).

then access would not apply whether a "broadband-originator" fully self-supplies its network, or instead hands off traffic to another service provider for termination on the PSTN.

This result would be easy to administer, and simply a variation on other reporting mechanisms used today to, for example, distinguish between interstate and intrastate toll traffic. The Commission could mandate a competition-friendly, easy-to-implement mechanism for showing which calls are originated on broadband. This mechanism could include filling a field in the customer data record with information indicating that the call was broadband-originated. The Commission would have to mandate that such data be accurate, and that LECs accept such data as a safe harbor through which IP-enabled "VoIP" providers (or their interconnecting service providers) are not subject to access charges, regardless of whether termination to the PSTN is through an interconnection trunk or a feature group trunk. The mechanism should not require that a provider establish separate "VoIP" traffic trunks with the LEC.

Similarly, if the Commission finds that certain configurations of IP-enabled voice services are "information services" not subject to USF, that result should apply whether the so-called "information service" provider transports the service only over its own network, or "instead multiple service providers are involved in providing IP transport." Id. Any other result would unlawfully discriminate in favor of the USF-exempt configuration, violate Section 254, and distort network investment.

C. Immediate Clarification and Enforcement of the Rules is Needed in this Area, Even if the Rules are Interim Pending Further Reform.

As WilTel noted above, we are not naïve about the difficulties of completing reform of intercarrier compensation and universal service. We strongly encourage the Commission to move as swiftly as possible in these areas. At the same time, some competitors already are claiming exemption from access and/or universal service based on allegations that they are

providing "VoIP." Given that market rates for interexchange services are even below access cost in many cases, it is clear that some in the industry are interpreting the law aggressively in the absence of Commission clarification and enforcement. Put another way, the Commission's failure to act is itself an act that is distorting competition in the voice market. Companies are competing based on their relative appetite for regulatory risk and potential retroactive liability, rather than the quality and efficiencies of their networks and operations.

WilTel does not support today's access charges, which we believe are above-cost, distortionary, and incite many of the "self-help" avoidance actions noted above. For example, above-cost intrastate switched access charges are the key reason why access avoidance based on "IP" theories are particularly prevalent in states with disproportionately high intrastate access rates. 7/ Similarly, WilTel strongly supports reform of the universal service system to ensure that one telecom technology or service configuration cannot escape USF obligations and leave that burden on its competitors. That is a recipe for the USF system to collapse, sooner rather than later.

With so much at risk, the Commission must not defer decisions regarding application of the access and universal service rules today on a wager that reform may come tomorrow. The Commission must state the rules that apply now, at least on an interim basis, and make clear that it will enforce them. This is the most immediate requirement before the Commission in this docket. It will address competitive distortions that are occurring today, put all companies on an equal footing, and permit IP investment to proceed based on a common understanding of the rules.

7/ *See, e.g.,* SBC Ex Parte Letter, WC Docket No. 02-361 (Feb. 23, 2004)(alleging that Sprint was avoiding access in Texas, where intrastate access rates are about eight to nine times higher than interstate charges).

CONCLUSION

WilTel looks forward to reviewing the comments of other parties and participating further in this important docket. We share the goal of many for reduced regulation of new IP-enabled services. Our comments here are consistent with that goal, and the non-discrimination requirements of the Act.

Respectfully submitted,

WilTel Communications, LLC

By _____

Peter A. Rohrbach
David L. Sieradzki
Hogan & Hartson LLP
555 13th Street, NW
Washington, DC 20004

Its Attorneys

Blaine Gilles, Ph.D
9525 W. Bryn Mawr, Suite 140
Rosemont, IL 60018

Adam Kupetsky
WilTel Communications, LLC
One Technology Center TC 15-H
Tulsa, OK 74103

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